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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GERALD MANUEL, JR., Defendant and Appellant.	E036429 (Super.Ct.No. FBA006576) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Thomas D. Glasser, Judge. Reversed.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr., Supervising Deputy Attorney General, and Erika Hiramatsu, Deputy Attorney General, for Plaintiff and Respondent.

The facts in this case are crucial, because ultimately, the appeal comes down to whether, if defense counsel had objected to certain out-of-court statements, defendant would still have been convicted of murder.

Victim Roy Serafin was shot and killed in the street in front of his house in Barstow. According to his family, his friends, and the physical evidence, he had just backed his pickup truck out of his driveway to go to his parents' house; he was shot while near, and probably still inside, the pickup.

One Ellis Cooper claimed to be an eyewitness to the shooting. He told the police that defendant was the shooter. Cooper, however, did not testify at trial and was never subject to cross-examination. His hearsay statements came into evidence (repeatedly) only because defendant's trial counsel failed to object to them -- indeed, he elicited most of them himself.

In light of Cooper's statements, the police arrested defendant. At first, defendant denied any involvement in the shooting. After he had been in custody for about four months, however, he told the police that he and his friend Jolin Reynolds had been trying to collect a drug debt from a "Mexican dude." Defendant had agreed to "thump him up," but defendant -- and another friend, Michael Halsey -- were still in their car when Reynolds got out and shot the "dude" instead. Defendant insisted that Cooper was not there.

The police then arrested Halsey. Halsey admitted driving defendant and Reynolds to the victim's house. However, he claimed that he and *Reynolds* were still in the car

when *defendant* walked up to the victim's front door and shot the victim there. Halsey denied even knowing Cooper.

Defendant, Halsey, and Reynolds were charged jointly with one count of murder. (Pen. Code, § 187, subd. (a).) Reynolds's trial was later severed. Halsey entered into a plea bargain. As a result, he was the key witness against defendant at trial.

Halsey testified that he drove defendant, Reynolds, and Cooper to Howze Liquor to buy some beer. While they were there, defendant spotted the victim. At defendant's direction, they followed the victim home. Defendant got into a fistfight with the victim and, when he found himself on the losing end, shot him. Thus, Halsey's trial testimony differed in several respects from his earlier statements to the police. Moreover, it conflicted with other evidence; among other things, the victim had not had enough time to go to and from Howze Liquor. Nevertheless, the prosecution argued that Halsey's trial testimony was entirely truthful and that it was corroborated by Cooper's hearsay statements.

A jury found defendant guilty of first degree murder. (Pen. Code, §§ 187, subd. (a), 189.) It also found that he personally and intentionally discharged a firearm, proximately causing death. (Pen. Code, § 12022.53, subd. (d).) Accordingly, defendant was sentenced to a total of 50 years to life in prison.

In this appeal, defendant contends:

1. The trial court erred by failing to exclude Cooper's statements identifying defendant as the shooter, both as inadmissible hearsay under state law and under the

federal confrontation clause as construed in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*).

2. The trial court similarly erred by failing to exclude evidence that one Annette Rasch told the police that defendant was at the crime scene.

3. The prosecutor committed misconduct by introducing evidence of the victim's gang affiliation, as well as other evidence that the crime was gang related.

4. The trial court erred by failing to exclude evidence that defendant's nickname was "C-Murder."

In each instance, defendant alternatively contends that his trial counsel rendered constitutionally ineffective assistance by failing to object to the challenged evidence.

We will hold that defendant's trial counsel waived the contention that Cooper's statements were inadmissible by failing to object to them. Defense counsel's failure to object on *Crawford* grounds was not deficient performance, because *Crawford* was not decided until after this case was tried. His failure to object on hearsay grounds, however, *was* objectively deficient performance. Moreover, (1) because there was little evidence of defendant's guilt aside from Halsey's testimony, (2) because Halsey's credibility was questionable, and (3) because the prosecutor relied on Cooper's statements to corroborate Halsey, we conclude that the deficient performance was prejudicial.

Because defendant's other contentions appear unlikely to arise again on remand -- or, at least, unlikely to arise in the same procedural posture -- we do not address them.

I

FACTUAL BACKGROUND

A. *The Shooting*.

The victim lived in Barstow with his girlfriend and her two sons. On March 15, 2001, he got home from work about 3:45 p.m. He was there until about 7:00 p.m., when he got a phone call from his friend, Pablo Lara Ramos.[1] Ramos said he was at the victim's parents' house, and he asked the victim to come over there and help him install a door. The victim told Ramos that "he was on his way." He then left, saying that he was going to his parents' house but would be right back. His girlfriend and her son both heard him start his pickup truck and back it out of the driveway.

A couple of minutes later,[2] they heard three gunshots. They ran to the front door. They had a "problem" opening it, because it was secured with three or four separate locks and deadbolts. When they did manage to open it, they saw the victim, lying on his back in the driveway.

At 7:15 p.m., the girlfriend called 911. Ramos learned about five minutes after talking to the victim that he had been shot.

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[1] The victim's phone recorded this call as received at 7:11 p.m. Although the police did not check whether the phone's clock was correctly set, one officer testified that it was "[f]airly close."

[2] The girlfriend's son testified that it was "like two minutes" later. The girlfriend testified that it was "not even 15 minutes later . . . ." However, she had told police it was "a couple of minutes" later.

When paramedics arrived, the victim was not breathing; almost immediately after that, his heart stopped. He was taken to a hospital, where he was officially pronounced dead. He had been shot three times. Two bullets had entered his left arm, just above the wrist, at almost the same spot, and exited, leaving fragments behind. There were powder burns around these wounds, indicating that the shots had been fired from "[w]ithin inches."

A third bullet had entered the victim's left chest, punctured both lungs and the aorta, and lodged inside his right back. This was the cause of death. There were no powder burns around this wound. This bullet was recovered and found to be .32 caliber.

There were fresh scrapes on the victim's face. There were also two lacerations, on his right eyelid and his right lip; these could have been caused either by bullet fragments or by a blunt impact, such as a punch. There were fresh scrapes on the back of his right shoulder, the back of his right hand, and on both knees; he could have gotten these by falling to the ground.

The victim's white pickup was in the street, in front of the house;[3] the driver's side door was open, the motor was running, and the headlights were on. Inside the pickup, a bullet had grazed the steering wheel grip, at the nine o'clock position. There were two bullet fragments on the floorboard. Blood was spattered on the steering wheel, the steering wheel column, the dashboard, and the inside of the driver's side door. However,

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[3] It was facing south, which could have been either toward the victim's parents' house or away from Howze Liquor.

there was no blood on the driver's seat. This was consistent with the victim being in the seat when he was shot. Outside the pickup, on the driver's side, there were several blood spatter marks, which were consistent with the victim being either punched or shot while outside.

A trail of blood drops led from the driver's side door, around the front of the pickup, and up the driveway to the victim's body. In the street near the pickup, there were two more bullet fragments. There were no shell casings. The gun was never found.

Inside the victim's wallet, the police found a folded piece of paper. On the paper was a list of names and telephone numbers, mostly of the victim's relatives. One of the names on the list was "Gerald," although the phone number next to it belonged to one Martin Sanchez. Inside the folded paper was a small bindle of methamphetamine. The victim's blood tested positive for methamphetamine.

B. *Testimony of Tanya Edson*.

Tanya Edson testified that on the day of the shooting, between 3:00 and 4:00 p.m., she ran into defendant and Jolin Reynolds at a Jack in the Box restaurant. They were in Reynolds's blue car. Defendant said "[t]hat he had to go get a gun and go take . . . care of some business." Defendant was selling drugs at the time.

C. *Testimony of Halsey's Girlfriend and Others*.

Michael Halsey's girlfriend lived just outside Barstow. She, her roommate, and her roommate's boyfriend all testified that, on the day of the shooting, between 5:00 and 6:00 p.m., defendant and Halsey came to her house in Halsey's gray Honda. Halsey had

a bone to pick with the roommate's boyfriend; defendant evidently was there to support him. Defendant and the boyfriend talked or argued for about 15 minutes; then defendant and Halsey left. At 8:00 or 8:30 p.m., defendant and Halsey returned.

D. *Testimony of Lenora Peralta*.

Lenora Peralta testified that on the day of the shooting, between 6:30 and 7:00 p.m., defendant and Halsey, in Halsey's gray Honda, came to her mother's house looking for defendant's then-girlfriend. When told she was not there, they left.

D. *Testimony of Michael Halsey*.

Halsey testified that he and defendant had been friends for about four years. He had grown up with Reynolds and was closer to Reynolds than he was to defendant. As far as Halsey knew, defendant was not selling methamphetamine in March 2001, though he had sold it in the past.

According to Halsey, on the day of the shooting, defendant called him and asked him to pick him up. When Halsey arrived at defendant's house, around 6:30 p.m., he found Ellis Cooper already there. After about 10 minutes, all three of them left. They picked up Reynolds, then went to Howze Liquor to buy some beer.

Defendant and Reynolds went inside; Halsey and Cooper stayed in the car. After about five minutes, defendant and Reynolds came back out. Defendant told Halsey to follow a man who had just left the store in a pickup truck. They followed the pickup

until it stopped on the street where the victim lived.[4] When the man got out, defendant and Cooper got out, too. Reynolds also got out but remained standing near the car. Halsey stayed inside the car.

Defendant and the other man started arguing. Defendant started a shoving match and then a fistfight. At a point when the other man seemed to be winning, defendant said something to Cooper. Cooper came back to Halsey's car and grabbed an object from under the front passenger seat. Cooper then hit the other man over the head. The man fell to the ground.

Halsey testified that, once the victim fell, " . . . I couldn't actually see him," because "[h]is truck was in the way." Nevertheless, he said that "it looked like he was trying to get up." He had told police that the victim was on his knees. He explained, "I could vaguely see him. I saw his knees under the truck."

Defendant took the object from Cooper. According to Halsey, defendant then "shot the guy" about three times. Cooper ran away. Reynolds got back into the back seat. Defendant got back into the front passenger seat and said, "Let's get out of here." Halsey took off. He dropped defendant off at defendant's house.

When the police first interviewed Halsey, he denied knowing anything about the shooting. At trial, he explained that he was afraid of defendant; also, he was trying to protect himself and Reynolds.

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[4] It took two and a half minutes to drive from Howze Liquor to the victim's house.

On October 16, 2001, Halsey was arrested and charged with first degree murder. This time, when the police interviewed him, he told them that he drove defendant to a house to collect some money; defendant had a gun. However, when the police told him that they had witnesses who had seen him at the confrontation, he said that he saw defendant knock on the door and shoot the victim when he answered it.

The next day, Halsey told police that he drove Reynolds, defendant, and a stranger to the shooting scene. He and Reynolds stayed in the car; defendant and the stranger went up to the front door, and defendant shot the victim. He denied knowing Cooper. At trial, he explained that he was afraid of both defendant and Cooper.

About a month before trial, the prosecutor offered Halsey a plea bargain in exchange for his testimony. As a result, the police interviewed Halsey again. This time, his statement was consistent with his testimony at trial. (Of course, at this point, he had the benefit of the prosecution discovery.)

Halsey then entered into a plea bargain. It provided that, in exchange for his truthful testimony in this case, he would be released on his own recognizance after testifying, he would plead guilty to being an accessory after the fact to murder, and he would be sentenced to time served.

D. *Defendant's Statements to the Police.*

1. *First Interview: March 30, 2001.*

On March 30, 2001, the police located defendant at Reynolds's apartment, arrested him, and interviewed him. He denied knowing anything about the shooting. He

said that on March 15, he was either "at work or getting ready to go to work or in th[e] process of moving . . . ." He admitted having sold drugs "[b]ack in the day," but he denied doing so any longer.

2. *Second Interview: March 30, 2001*.

While defendant was being booked, he told an officer that he had more to say. As a result, the police interviewed him again. This time, defendant said he had heard from the bartender at the Katz Bar "about that dude that got shot in his driveway . . . ." Someone had parked outside the victim's house and honked the horn twice; when he came out, he was shot in the chest. Defendant added that he had remembered that the Katz Bar was where he was on the night of March 15.

3. *Third Interview: March 31, 2001*.

The next day, March 31, 2001, the police interviewed defendant again. He continued to deny any involvement. He said that, on the day of the shooting, around 5:00 or 5:30 p.m., he went to the Katz Bar, and he stayed there for four or five hours. He admitted having sold methamphetamine and marijuana previously, but he added, "I haven't sold no dope within four weeks."

He said he did not know anybody on the victim's street and did not go there. However, he did know someone named Tanya who lived on a nearby cross-street. He had been to Tanya's house twice, with Halsey, in Halsey's gray Honda. He was not sure when the second visit occurred, although it could have been on March 15. "[I]t was pouring down rain." When he and Halsey were at (or just leaving) Tanya's house, they

heard a loud argument down the street, followed by "two loud noises," "like boom, boom."

Finally, defendant said that, on the way to Tanya's house, he saw two men arguing. They were in the street, pushing each other in the chest. Fifteen or 20 minutes later, while he was at Tanya's house, he heard "boom boom . . . boom, like that." (Original ellipsis.) This was around 7:30 p.m.

4. *Fourth Interview: July 26, 2001*.

On July 26, 2001, the police interviewed defendant again. At first, defendant repeated that, on the night of the shooting, he was at the Katz Bar, and someone told him about the shooting.

Defendant then claimed that, while he was in a holding tank at the courthouse, a Mexican man had told him that his uncle shot the victim in the head and chest "because of a drug deal gone bad." The victim had just come out of his house and was walking toward a white pickup. The gun used was either .38 or .45 caliber.

Finally, after further questioning, defendant gave essentially the following account.

Reynolds had been selling methamphetamine on defendant's behalf. Reynolds told defendant that a "Mexican dude" owed them $200 for drugs. Defendant agreed to confront this dude and "thump him up."

Defendant and Reynolds were in Reynolds's car when they happened to run into the dude at Howze Liquor. (Halsey was also in the car.) They demanded their money.

The dude said he did not have it. Reynolds and defendant both pushed him. The dude pushed them back. Then, for some reason, they left.[5]

Defendant and Reynolds then ran into a different Mexican man and his uncle, who were both affiliated with the Los Gents gang. When defendant told them about the dude, they said they had a "beef" with him, too, and they would get defendant's money for him.

Defendant had Reynolds get the dude on the phone. Defendant demanded his money, but the dude threatened him.[6] Defendant was "steamed." He had it "in [his] heart to stomp and beat [the dude] to death," but Reynolds and the Gents members would not tell him where the dude lived, because they knew what he might do.

Defendant therefore left the matter up to Reynolds and the Gents. He told Reynolds, if he got the money, to meet him at the Katz Bar.[7] Halsey picked defendant up, and they drove around for a while (partly looking for the dude). When defendant and Halsey arrived at the Katz Bar, they saw Reynolds and the dude in the back. One or two of the Gents members were there, too. "The[y]" were going to fight with the dude.

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[5] Defendant first said he left because he "ain't got time for this." Next, he explained that his "cell phone [was] ringing off the hook." Later, he said that "the owners of the store walked out . . . and they know me . . . and I d[id]n't want to disrespect [them]."

[6] At one point, however, defendant indicated that the dude made this threat in person. He said that he and Reynolds went back to "the Mexican dudes [*sic*] house" and demanded their money. The dude told defendant, "[I]f I kept stressing him on it then he was gonna cap me." Defendant thought, "[T]his dude [is] about to get smoked."

[7] Defendant was inconsistent with respect to whether the dude threatened him before or after the confrontation at Howze Liquor. He also tended to get the confrontation at Howze Liquor mixed up with the later confrontation at the Katz Bar.

Defendant then admitted that, rather than being at Katz Bar, the dude "was in his drive way," at "his house[,] I guess." Defendant said that he and Halsey stayed in their car, while Reynolds and the Gents member (or members) "jump[ed] out" of Reynolds's car and approached the driveway. Defendant said he thought they were just going to beat the dude up; however, when they got out of the car, he realized they were going to shoot him.

The dude was trying to unlock the door (or the trunk) of his "car" when he was shot. Defendant heard six gunshots. At first, defendant said it was a Gents member who shot the dude. Then he said he did not know who pulled the trigger. Finally, he said that he saw Reynolds shoot him.

Defendant kept saying that the dude who got shot did not look like the victim and was not named Roy. Also, defendant said he did not like Cooper, and Cooper was not present for any of these events -- "Cooper don't ride with me . . . ."

Defendant said he had known that the police were looking for him; he bragged that he had always been "one step ahead" of them.

E. *Defendant's Jailhouse Phone Conversation*.

While defendant was in jail, he had a phone conversation with his then-fiancée. When she said, "I wish I could take your place," he replied, "I got myself in this mess; I'm going to get myself out of it. I'll do my time and move on."

He urged her not to come to court anymore and to "move on with [her] life." He then said, " . . . I don't like people. And I will get out, do the same thing I did the first

[--] what I just did, again. . . . I don't have remorse behind that [--] whatsoever. That don't mean shit to me. When they said C-Murder put that dude on his hands and knees and he shot him in the head I started laughing, th[at] shit was funny to me."

II

ELLIS COOPER'S STATEMENTS

Defendant contends that the admission of hearsay statements by Cooper violated both state law and *Crawford*. Anticipating the response that his trial counsel waived this contention by failing to object, defendant also contends that the failure to object constituted ineffective assistance.

A. *Additional Factual and Procedural Background.*

1. *Detective Espinoza's Testimony.*

Detective Andrew Espinoza testified that he had received "information" that "a [B]lack male, about 30 to 35, . . . kind of dirty and disheveled" had been an eyewitness to the shooting. Eventually, he determined that this description referred to Ellis Cooper. He interviewed Cooper at the police station. After that, he started looking for a Black man nicknamed C-Murder. Meanwhile, he determined that C-Murder was really defendant.

On cross-examination, defense counsel brought out -- in considerable detail -- the content of Cooper's statements, including that Cooper claimed to have seen the shooting, identified the shooter as C-Murder, and picked defendant out of a photo lineup. For example, defense counsel asked:

"Q . . . The name C-Murder, did that come directly from Mr. Cooper or was that a suggestion made by . . . you . . . ?

"A No, that came from Mr. Cooper."

Defense counsel even brought out the fact that the police had previously prepared a photo lineup with defendant in it, because defendant was a suspect in "another case involving the theft of a sawed-off rifle . . . ." However, he did establish that, when the police took Cooper to the crime scene, he seemed "a little confused and disoriented," and "his observations and directions" were "off."

2. *Detective Griego's Testimony.*

Detective Leo Griego testified that on March 27, 2001, he and Detective Espinoza interviewed an eyewitness to the shooting. That witness told them that the shooter was "C-Murder." The witness also picked defendant out of a photo lineup.

On cross-examination, defense counsel asked who this witness was. Detective Griego identified him as Cooper. Defense counsel tried to get Detective Griego to agree that Cooper was a "drugg[i]e," but without success. He did manage to establish that Cooper told the police that he had been just standing around at the shooting scene, but they had learned from another witness (presumably Halsey) that this was not the truth and that Cooper had actually been inside the car.

On redirect, the prosecutor asked Detective Griego:

"Q . . . Now, when you were speaking to Mr. Cooper, did he provide you with facts as to what happen[ed] at the scene that only a person who was at the actual scene would know?

"A Yes."

3. *Closing Argument.*

In closing, the prosecutor argued that Cooper's hearsay statements to the police corroborated Halsey's testimony. For example, he stated: "We know that defendant was with Michael Halsey, Jolin Reynolds and Ellis Cooper on the day of the murder. How do we know that? . . . [¶] Mr. Halsey came in here and told you who was with him during the day of the murder. He told you that he was with the defendant, that he was with Jolin Reynolds and that he was with Ellis Cooper. And you also have Officer Espinoza over here who told you that he spoke to Ellis Cooper and that Ellis Cooper told him that he was with the defendant on the day of the murder."

Similarly, he stated: "And we know that Mr. Cooper walks away from the scene. Mr. Halsey told you that, and actually Mr. Cooper told Officer Espinoza that during the interviews."

Finally, he stated: "You cannot find a defendant guilty based on the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense.

"What does that mean? That basically means you cannot convict this defendant based solely on Mr. Halsey's testimony, if you think Mr. Halsey is an accomplice. It also

means you cannot convict this defendant solely on the statements made by Mr. Cooper to Officer Espinoza, if you believe Mr. Cooper is an accomplice. But first you have to decide whether each of them is an accomplice or not. Because if they are not accomplices, you can base your decision solely on Mr. Halsey's testimony, and you can base your decision solely on the statement made by Mr. Cooper, if you find that they are not accomplices."

The prosecutor argued that Halsey was not an accomplice, but he conceded that Cooper was: "Is Mr. Cooper an accomplice? Yeah, he is. Why? Well, did he assist in the murder? Did he aid the murder? Well, clearly, he did, according to Mr. Halsey's testimony. What did Mr. Cooper do? Mr. Cooper went and got the gun from the car to assist the defendant. So, yeah, Mr. Cooper's testimony needs to be corroborated, but it is. It's corroborated by Mr. Halsey. It's corroborated by the defendant's own statements. And it's corroborated by Tanya Edson."

In his rebuttal argument, he concluded: "[T]his defendant shot Roy Serafin three times and killed him. [¶] Mr. Halsey described it for ya. According to Officer Espinoza, Mr. Cooper told him that too. And Tanya Edson's statement would verify that. We have the defendant putting himself out at the scene."

B. *Analysis*.

1. *Defendant's Objections Have Been Forfeited*.

Preliminarily, the People contend that defendant forfeited the contention that Cooper's statements were inadmissible by failing to raise it below.

This case was tried before *Crawford* was decided. "Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703.) "A contrary [rule] would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal. Moreover, . . . [such] an objection would have been futile, and 'The law neither does nor requires idle acts.' [Citation.]" (*People v. Kitchens* (1956) 46 Cal.2d 260, 263, quoting Civ. Code, § 3532.)

Crawford "was an unanticipated departure from the high court's established Sixth Amendment jurisprudence. [Citation.]" (*People v. Rincon* (2005) 129 Cal.App.4th 738, 754.) For this reason, it has been held that the failure to raise a confrontation clause objection in a trial held before *Crawford* does not bar a *Crawford* claim on appeal. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208 [Fourth Dist., Div. Two]; *Rincon*, at pp. 755-756; *People v. Saffold* (2005) 127 Cal.App.4th 979, 983-984; *People v. Butler* (2005) 127 Cal.App.4th 49, 54, fn. 1; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2.)

Here, however, defense counsel could at least have objected on state-law hearsay grounds, but he did not. In each of the cases cited above, either trial counsel *did* object on hearsay grounds (*People v. Rincon*, *supra*, 129 Cal.App.4th at p. 749), or a hearsay

objection would not have been meritorious (*People v. Thomas*, *supra*, 130 Cal.App.4th at pp. 1209-1210; *People v. Saffold*, *supra*, 127 Cal.App.4th 983-984; *People v. Butler*, *supra*, 127 Cal.App.4th at p. 59; *People v. Johnson*, *supra*, 121 Cal.App.4th at p. 1410).

Does this make a difference? We think it does. It means that defense counsel *deliberately* chose not to object. Thus, even if he had known that he had *additional* grounds for objection, i.e., under *Crawford*, he *still* would not have objected. Requiring defense counsel to object on known, available grounds does not place an unreasonable burden on him to anticipate unforeseen changes in the law; neither does it encourage fruitless or futile objections. It simply requires him to manifest the intention of keeping the evidence out on whatever grounds, foreseeable or unforeseeable, may be available. If we were to hold that defendant can still assert *Crawford* on appeal, we would be giving him a windfall. Hence, we agree that defendant has forfeited any contention that the admission of Cooper's hearsay statements was reversible error.

2. *Ineffective Assistance of Counsel*.

Defendant therefore contends that his defense counsel rendered ineffective assistance.

a. *General Principles.*

"'To find ineffective assistance of counsel a court must determine that counsel's performance was deficient, falling "'below an objective standard of reasonableness . . . under prevailing professional norms'" [citations], and that there is a reasonable probability that "'but for counsel's unprofessional errors, the result of the proceeding

would have been different.’”’ [Citation.]” (*People v. Williams* (2006) 40 Cal.4th 287, 304, quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 677.)

“In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel’s performance was deficient because it ‘fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.’ [Citations.] Unless a defendant establishes the contrary, we shall presume that ‘counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.’ [Citation.] If the record ‘sheds no light on why counsel acted or failed to act in the manner challenged,’ an appellate claim of ineffective assistance of counsel must be rejected ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’ [Citations.] If a defendant meets the burden of establishing that counsel’s performance was deficient, he or she also must show that counsel’s deficiencies resulted in prejudice, that is, a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ [Citation.]” (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688 [104 S.Ct. 2052, 80 L.Ed.2d 674], *People v. Carter* (2003) 30 Cal.4th 1166, 1211, *People v. Pope* (1979) 23 Cal.3d 412, 426, and *Strickland*, at p. 694.) “[U]nless the record reflects the reason for counsel’s actions or omissions, or precludes the possibility of a satisfactory explanation, we must

reject a claim of ineffective assistance raised on appeal. [Citation.] Such claims are more appropriately addressed in a habeas corpus proceeding. [Citation.]" (*Id*. at p. 746.)

b. *Deficient Performance*.

Because *Crawford* had not yet been decided, defense counsel's failure to object on *Crawford* grounds could not constitute ineffective assistance. His failure to object on state-law hearsay grounds, however, could -- to say nothing of his efforts to elicit the evidence himself.

The People argue that the prosecutor introduced Cooper's statements for a nonhearsay purpose. This argument is strongest with respect to the very first time Cooper was mentioned. Detective Espinoza testified that, after he interviewed Cooper, he started looking for a Black man nicknamed C-Murder. It is arguable that, at this point, Detective Espinoza had not actually testified to the content of any out-of-court statement by Cooper. Alternatively, it is arguable that, to the extent that he had, the out-of-court statement by Cooper was offered, not for its truth, but for the nonhearsay purpose of shedding light on the police investigation. (See, e.g., *People v. Beamon* (1973) 8 Cal.3d 625, 633-634 [officer's testimony that he connected defendant with highjacking by name on registration of vehicle parked nearby "was merely an account of the officer's observation and conduct," and hence not hearsay]; *People v. Smith* (1970) 13 Cal.App.3d 897, 910 [officer's testimony that witness said he saw suspect run in certain direction "was not hearsay because it was not offered for its truth, but only to establish the cause for the officer's pursuit"]; *People v. Spivak* (1959) 166 Cal.App.2d 796, 812-813

[officer's testimony that he had been told that informant had gone to certain place was admissible to explain why he went to that place].)

Detective Griego, however, testified that an eyewitness identified the shooter as C-Murder and picked defendant out of a photo lineup. This was testimony to the content of an out-of-court statement. Moreover, it was offered for its truth, not merely to shed light on the police investigation; otherwise, Detective Griego could have simply testified (much as Detective Espinoza did) that, based on unspecified information from an eyewitness, he became interested in locating and interviewing defendant. Most important, in closing argument, the prosecutor asked the jury to consider it for its truth.

Finally, defense counsel himself brought out, in even greater detail, from both Detective Espinoza and Detective Griego, the fact that Cooper had identified defendant as the shooter. He did not request any limiting instruction. Thus, the jury was free to consider Cooper's out-of-court statements as evidence of their truth.

In this case, we simply cannot imagine any sound tactical reason for defense counsel to elicit, or to allow the prosecution to elicit, Cooper's hearsay statements. The downside of this evidence was obvious. As we will discuss further, *post*, the only witness at trial who could identify defendant as the shooter was Halsey, and his testimony was subject to question. Cooper's hearsay statements not only corroborated Halsey, but did so without subjecting Cooper to cross-examination. The evidence had no apparent upside.

The People suggest that defense counsel may have been trying to show "that Cooper's statements were unreliable and false." If Cooper's statements had never come in, however, there would be no need to show that they were unreliable and false! This is to say nothing of the fact that his attempts to impeach Cooper, as a "druggie," etc., were largely ineffective; moreover, in the process, he brought out the damaging fact that defendant was a suspect in some other crime.

At oral argument, the People suggested that defense counsel could have been trying to show that Cooper knew details that only someone who had been present at the shooting would know and therefore that Cooper may have been the shooter. Of course, this is the exact *opposite* of the People's *earlier* suggestion that defense counsel was trying to show that Cooper's statements were *unreliable*. In any event, it is belied by the record. Practically the only thing defense counsel did to impeach Cooper was to bring out that "his observations and directions" at the crime scene were "off." It was the prosecutor, on redirect, who brought out that Cooper knew things that only someone who had been at the scene would know. Finally, the fact that Cooper had this knowledge did not tend to prove that he was the shooter. In virtually every account of the shooting, Cooper, defendant, Halsey and/or Reynolds were present and would have had the same knowledge. Rather, Cooper's supposedly accurate knowledge of the scene only tended to prove that his identification of defendant as the shooter was also accurate.

We can imagine only one other conceivable tactical purpose. The prosecution had listed Cooper as a prospective witness. If Cooper had actually been called, then he could

have testified that he witnessed the shooting and that defendant was the shooter. His previous hearsay statements might also have become admissible. (See Evid. Code, §§ 791, 1235, 1236, 1238.) Even so, we do not believe that reasonable defense counsel would have elicited Cooper's hearsay statements *before the prosecution actually called Cooper*. He could have tried to impeach Cooper as a "druggie," or as "confused" and "disoriented," without bringing out Cooper's hearsay statements. If there was any impeachment that required Cooper's actual statements as a foundation (e.g., to show that the officers used the name C-Murder first), he could have brought it out when Cooper testified or by recalling the officers thereafter. Finally, even if defense counsel was somehow relying on the expectation that Cooper would testify, as soon as he found out that he was mistaken, he should at least have moved for a mistrial or to strike.

c. *Prejudice*.

We therefore turn to whether the deficient performance was prejudicial. As we already mentioned, the only witness who could identify defendant as the shooter was Halsey. Halsey, however, was strongly motivated to lie -- most obviously, to get himself out from under a first degree murder charge, but also to protect Reynolds. Halsey was closer to Reynolds than he was to defendant, and he admitted that he had lied to the police partly to protect Reynolds.

Halsey's testimony was at odds with other evidence. For example, according to Halsey, he picked up defendant and Cooper around 6:40 p.m.; together, they picked up Reynolds, then went to Howze Liquor. Three witnesses, however, saw Halsey driving

defendant around earlier, between 5:00 and 6:00 p.m. A fourth witness saw defendant with Halsey -- and not with either Reynolds or Cooper -- between 6:30 and 7:00 p.m.

Also according to Halsey, he and defendant followed the victim home from Howze Liquor. The victim, however, had just told his family that he was going over to his parents' house. He told Lara that "he was on his way." The police did not find anything in his truck or on his person that he had purchased at Howze Liquor. Even if he did have some reason to go to Howze Liquor, he had no apparent reason to stop back home.

Moreover, the victim simply did not have enough time to go to Howze Liquor and back. At 7:11 p.m., Ramos called him and asked him to come over. The 911 call came in at exactly 7:15 p.m. It would have taken five minutes just to drive to Howze Liquor and back, to say nothing of the time the victim would have had to spend in the store or the time it took for the shooting. Certainly the clock on the victim's phone could have been off by a few minutes (although an officer admitted that it was it was "[f]airly close".) However, the victim's girlfriend and her son both said that they heard the victim's truck back out, and two or three minutes later, they heard shots. Ramos likewise testified that, five minutes after speaking to the victim, he learned that he had been shot.

According to Halsey, Cooper hit the victim over the head with the gun. The victim, however, did not have any injury that corresponded with such a blow (although admittedly, as the People argued, it was conceivable that Cooper hit him in the eyelid or the lip, each of which did have a laceration).

According to Halsey, all three shots were fired at the end of a fistfight, after the victim had fallen to his knees next to his pickup and when he was trying to get up.[8] The physical evidence, however, strongly suggested that the victim was inside his pickup when at least some of the shots were fired -- most likely the two that hit his wrist. Unlike the shot that hit him in the chest, those two shots had been fired from very close range. One of them had grazed the steering wheel. Bullet fragments, after exiting the victim's wrist, had ended up inside as well as just outside the pickup. There was blood spatter on the steering wheel, the dashboard, and the inside of the driver's side door, but no blood on the driver's seat itself.

Finally, according to Halsey, after the shooting, he dropped defendant off at defendant's house. Three witnesses, however, testified that at 8:00 or 8:30 p.m., Halsey drove defendant to Halsey's girlfriend's house.

In addition, Halsey had given the police several different accounts. It was only after he had seen the discovery that he gave them the account to which he testified at trial.

Significantly, there was absolutely no physical or forensic evidence tying defendant to the crime. The "Gerald" on the victim's list had a phone number that was not defendant's.

Admittedly, Tanya Edson testified that, when she ran into defendant and Reynolds around 3:00 or 4:00 p.m., defendant said "[t]hat he had to go get a gun and go take . . .

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[8] This was questionable in itself, as Halsey also testified that, at this point, he "couldn't actually see" the victim.

care of some business." No one else, however, saw defendant with Reynolds, or in Reynolds's car, at all that day;[9] rather, defendant was consistently seen with Halsey, in Halsey's car. Also, defendant did not seem to be in any hurry to "take care of business"; instead, he was seen looking for his girlfriend, as well as backing Halsey up in a dispute. In any event, even if Edson's testimony was accurate, it was consistent with defendant's statement to the police that he sent Reynolds to recover his $200 from the victim and that Reynolds was the shooter.[10]

Defendant's own statements to police were not particularly incriminating. Obviously, many of them were lies, but then so were many of Halsey's statements. Defendant was under pressure to explain his supposed presence at the scene. The police insisted that they had witnesses who had identified him as being there and specifically as the shooter. They told defendant, "[E]verybody else is saying you did it . . . ." Also, defendant was hoping (perhaps naïvely) that his statements would win him his freedom. For example, he said, "[I]f I give you the statement, . . . I will eventually be out . . . ." Detective Espinoza replied, "Probably, yeah," although he added, "We can't make any promises . . . ."

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[9] During one interview, the police and defendant discussed the fact that Reynolds's car was "broken down" on the day of the shooting.

[10] In that scenario, defendant might still be liable as an aider and abettor. However, he was not tried on that theory. Also, he would not be subject to an enhancement under Penal Code section 12022.53, subdivision (d).

Even under these circumstances, all that defendant admitted was being present when Reynolds shot the victim. He did know that the victim had a white pickup and that he was shot in the chest while in his driveway (although he claimed to have learned this from others). However, he got other details wrong. He said that the gun was either .38 or .45 caliber, when in fact, it was .32 caliber. He variously described two, three, or six shots. His account differed from Halsey's on any number of points; for example, he insisted that Cooper was not present.

Finally, in his phone conversation with his girlfriend, defendant said, "I will . . . do the same thing I did the first [--] what I just did, again. . . . When they said C-Murder put that dude on his hands and knees and he shot him in the head I started laughing, that shit was funny to me." In context, however, he was trying to convince her to leave him and to move on with her life. Thus, while this was an extremely damaging admission, the jurors could have had a reasonable doubt as to whether defendant had actually committed the crime or was just trying to make his girlfriend think that he had.

We conclude that the admission of Cooper's hearsay statements could well have tipped the scales against defendant. No doubt there was *sufficient* evidence of defendant's guilt. Indeed, we are not prepared to say that, in the absence of Cooper's hearsay statements, it is *more likely than not* that defendant would have been acquitted. That, however, is not the standard. Rather, the standard is whether there is "a reasonable probability" -- defined as "a probability sufficient to undermine confidence in the outcome" -- that defendant would have been acquitted. (*People v. Stanley* (2006) 39

Cal.4th 913, 954.) In light of the many reasons to disbelieve Halsey, the fact that Cooper's hearsay statements, corroborating Halsey, were in evidence when they should not have been undermines our confidence in the jury's verdict finding defendant guilty.

III

DISPOSITION

The judgment is reversed. We direct the clerk of this court to send a copy of this opinion to the State Bar immediately upon the issuance of the remittitur. (Bus. & Prof. Code, § 6086.7, subd. (a)(2).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.